

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
WESTERN WASHINGTON REGION  
STATE OF WASHINGTON

CONCRETE NOR'WEST AND 4M2K, LLC,

Petitioners,

v.

WHATCOM COUNTY,

Respondent,

and

FRIENDS OF NOOKSACK SAMISH  
WATERSHED,

Intervenor.

**Case No. 12-2-0007**

**ORDER DENYING APPLICATION FOR  
CERTIFICATE OF APPEALABILITY**

**Thurston County Superior Court  
No. 12-2-02214-1**

**I. REQUEST FOR CERTIFICATE OF APPEALABILITY**

This Matter is before the Board on Petitioners' application for a Certificate of Appealability for direct review by the Washington State Court of Appeals in *Concrete Nor'West, a division of Miles Sand & Gravel Company, and 4M2KLLC v. Western Washington Growth Management Hearings Board; Whatcom County; and Friends of Nooksack Samish Watershed*, Thurston County Superior Court Cause No. 12-2-02214-1.

The Petition for Review filed by the Petitioners challenged Whatcom County's denial of a requested Ordinance amending its Comprehensive Plan and zoning map to create a Mineral Resource Lands designation and zoning overlay on approximately 280 acres of Petitioners' property. They alleged the denial resulted in violations of RCW 36.70A.120 and contravened RCW 36.70A.020(8), Whatcom County Code (WCC) 2.160 and the County's

1 Comprehensive Plan MRL goals and policies. The Final Decision and Order (FDO) was  
2 entered on September 25, 2012.

3  
4 Citing *Stafne v. Snohomish County*<sup>1</sup> and the Central Board's decision in *Cole, et. al. v.*  
5 *Pierce County*,<sup>2</sup> the Board concluded that while RCW 36.70A.130 authorizes local  
6 governments to amend comprehensive plans annually it does not require amendments.  
7 Moreover, the Board found that the statute does not dictate the adoption of specific  
8 proposed amendments.  
9

10 The Board found the Petitioners' could prevail if, and only if, the GMA, the County's Plan, or  
11 its development regulations imposed a duty on the County to designate mineral resource  
12 lands during an annual update when all applicable designation criteria are met. In the FDO,  
13 the Board concluded no such duty had been shown to exist; thus there was no violation of  
14 RCW 36.70A.120,<sup>3</sup> and the Board dismissed the case.  
15

16  
17 Petitioners appealed the Board's decision to the Thurston County Superior Court (Cause  
18 No. 12-2-02214-1) and now seek direct review by the Court of Appeals.  
19

## 20 II. DISCUSSION

21 The Board's authority regarding certificates of appealability is set forth in RCW 34.05.518(3)  
22 which provides in relevant part (emphasis added):  
23

24 (a) For the purposes of direct review of final decisions of environmental  
25 boards, environmental boards include those boards identified in RCW  
26 43.21B.005 and the growth management hearings board identified in RCW  
27 36.70A.250.

28 (b) An environmental board may issue a certificate of appealability if it finds  
29 that **delay** in obtaining a final and prompt determination of the issues **would**  
30 **be detrimental to any party or the public interest** and either:  
31

32 <sup>1</sup> *Stafne v. Snohomish County*, 174 Wn.2d 24.

<sup>2</sup> Case No. 96-3-0009c (July 31, 1996, FDO).

<sup>3</sup> RCW 36.70A.120: "Each county and city that is required or chooses to plan under RCW 36.70A.040 shall perform its activities and make capital budget decisions in conformity with its comprehensive plan."

- 1 (i) **Fundamental and urgent statewide or regional issues** are raised; or  
2 (ii) The proceeding is **likely to have significant precedential value**.

3 RCW 34.05.518(4) requires the Board to state in its certificate of appealability “which criteria  
4 it applied [and] explain how that criteria was met.” The Board’s review of Petitioners’ request  
5 will focus on each of those criteria: detrimental delay, fundamental/urgent issues and  
6 precedential value.  
7

8 **A. Detrimental Delay**  
9

10 A finding of detrimental delay is a threshold matter for the Board when considering a  
11 requested Certificate of Appealability. The Petitioners devote but limited argument to this  
12 issue. They suggest it is important to obtain “prompt clarification” of the meaning and scope  
13 of the *Stafne* decision. They argue that jurisdictions throughout the state may use that  
14 decision to justify denying any and all requested comprehensive plan amendments. The  
15 Petitioners’ argument is based mainly on conjecture and they fail to provide sufficient detail  
16 to establish denial of a Certificate of Appealability would be detrimental to them or the public  
17 interest. However, the Board desires to address all the applicable criteria.  
18

19 **B. Fundamental/Urgent State-wide or Regional Issues and Significant Precedential**  
20 **Value**  
21

22 The Petitioners focus primarily on an argument that appellate court review of the Board’s  
23 decision would be of significant precedential value. However, interlaced with that position is  
24 an unstated assertion that fundamental state-wide issues are similarly involved. The Board  
25 will consider those two criteria together.  
26

27 The Petitioners argue that various jurisdictions and the Board have and are incorrectly  
28 applying the *Stafne* decision so as to “... ignore legitimate amendment applications . . . .”<sup>4</sup>  
29 They state the *Stafne* language cited by the Board in its FDO was mere dicta as that  
30 decision focused on the appropriate initial forum for appeals related to comprehensive plan  
31  
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<sup>4</sup> Request for Certificate of Appealability at 5.

1 amendments and the "futility" exception. Petitioners further suggest *Stafne* did not address  
2 a situation similar to that presented in this matter: one where there is no dispute that  
3 comprehensive plan amendment criteria have been met.  
4

5 The Board does not agree with Petitioners' argument. Rather than establishing a new  
6 interpretation, *Stafne* and this Board's decision in the present matter merely restated what  
7 has long been the Board's GMA interpretation. Local jurisdictions generally have the  
8 discretion to reject proposed comprehensive plan amendments absent GMA or  
9 comprehensive plan duties, GMA statutory amendments, or appellate court decisions that  
10 require a jurisdiction to amend its comprehensive plan. That was the Central Board's  
11 position in *Cole, et al. v. Pierce County*<sup>5</sup> and *SR 9 / US 2 LLC v. Snohomish County*:<sup>6</sup>  
12

13       Additionally, *Cole* misinterprets the requirements of WAC 242-02-220(5). A  
14 petition may include an allegation that a local government failed to act;  
15 however, *Cole* overlooks the qualification contained in that section, and  
16 pointed out to the Board by the County: "action by a deadline specified in the  
17 act. . ." While RCW 36.70A.130 authorizes a local government to amend  
18 comprehensive plans annually, it does not *require* amendments. Moreover, it  
19 does not dictate that a specific proposed amendment be adopted. *Cole* did  
20 not point out any other statutorily created duty with which the County has  
21 failed to comply. At such time as the County *takes* an action pursuant to the  
22 authority of RCW 36.70A.130 or fails to meet a duty imposed by some other  
provision of the GMA, *Cole* may have an action that could properly be brought  
before the Board. Absent such facts, *Cole's* recourse is elsewhere.

23       The Board holds the County's failure to act cannot be construed to be an  
24 "action" under RCW 36.70A.130. The Board further holds that the actions  
25 challenged in *Cole's* petition were not taken in response to a GMA duty to act  
26 by a certain deadline, or in response to any other duty imposed by the Act,  
27 and that WAC 242-02-220(5) does not apply to this case. Finally, the Board  
28 holds that the County's failure to adopt proposed amendment 2.3 is not  
subject to the Board's jurisdiction under RCW 36.70A.280. *Cole* at 18.

29       The Board agrees with the County. Absent a change in the GMA's provisions  
30 and requirements or a regional or state decision that requires a jurisdiction to  
31 amend its Plan or development regulations to maintain compliance with the  
32 GMA, local jurisdictions generally have discretion in deciding whether, and

<sup>5</sup> Growth Management Hearings Board Case No. 96-3-0009c.

<sup>6</sup> Growth Management Hearings Board Case No. 08-3-0004.

how, to amend their GMA Comprehensive Plans and development regulations. SR 9 at 9.

The Supreme Court's reference in *Stafne* to those two Board decisions merely favorably recognized the long-standing position of the Board. The Board finds and concludes that fundamental and urgent statewide or regional issues are not raised and the proceeding is not likely to have significant precedential value.

### III. ORDER

After considering the requirements for a Certificate of Appealability as set forth in RCW 34.05.518, the Board finds the criteria of the statute have not been met with respect to the Board's Final Decision and Order. The Petitioners' request for a Certificate of Appealability is denied.

Entered this 13<sup>th</sup> day of December, 2012.

William Roehl, Board Member

Nina Carter, Board Member

Raymond L. Paolella, Board Member